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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, A. D. 1943.

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**No. 748**

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JOGGER MANUFACTURING CORPORATION,  
*Petitioner-Plaintiff,*

*vs.*

WENDELL H. ROQUEMORE, DOING BUSINESS AS  
MULTIGRAPH SALES AGENCY,  
*Respondent-Defendant.*

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**REPLY OF RESPONDENT TO PETITION FOR WRIT  
OF CERTIORARI.**

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PHILIP M. AITKEN,  
*Counsel for Respondent.*



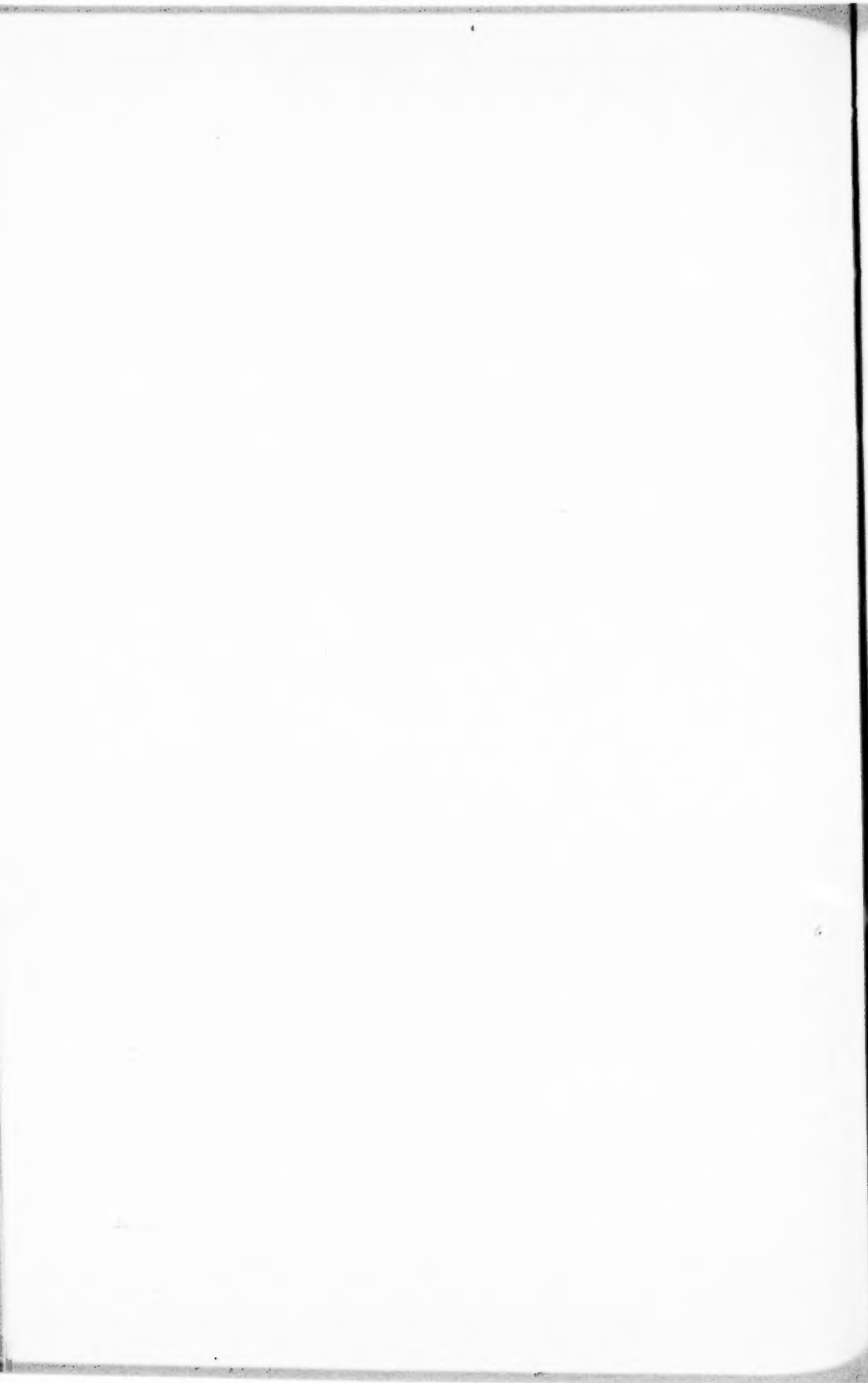
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**STATEMENT.**

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The respondent operated a business in Chicago which he called the Multigraph Sales Agency and in which business he sold Multigraph and Multilith machines and supplies (Orig. Rec. 85).<sup>\*</sup> The petitioner sued the respondent for alleged patent infringement arising from the sale by respondent of a jogger which had been manufactured by the American Multigraph Company or its successors, Addressograph-Multigraph Corporation (Orig. Rec. 85-86). The jogger was sold by respondent for attachment to a Multi-

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<sup>\*</sup> Where we refer to "Orig. Rec." this refers to the record filed by Petitioner in connection with its petition for certiorari to this Court which was denied October 13, 1941.

lith Machine manufactured by the Addressograph-Multigraph Corporation.

The record shows that the Addressograph-Multigraph Corporation first started to manufacture these alleged infringing machines in the fall of 1931 (Orig. Rec. 95) and that the petitioner knew of this fact at least by 1936 (Orig. Rec. 142, 143), but petitioner did not institute this action until 1939 (Orig. Rec. 2).

During the time petitioner was represented by his first attorneys, Thorley von Holst and Robert W. Poore of the firm of Ames, Thiess, Olson & Mecklenburger of Chicago, Illinois (Orig. Rec. 4), the following occurred:

(1) Decree was entered in the District Court in favor of petitioner on January 24, 1940 (Orig. Rec. 214).

(2) The Circuit Court of Appeals for the Seventh Circuit, after consideration of written briefs and oral argument, reversed the District Court's decree on March 6, 1941 (Orig. Rec. 449—118 F. (2d) 867) on two grounds, and held that the machine charged to infringe—

(a) did not infringe either of plaintiff's patents asserted; and

(b) that the license agreement between petitioner and the manufacturer permitted the manufacturer to make this machine and did not prevent respondent from selling it.

(3) Petitioner filed motion for rehearing and brief in support thereof on March 20, 1941 (Orig. Rec. 449) and petition was denied April 14, 1941 (Orig. Rec. 485).

(4) Petitioner filed petition for writ of certiorari in this Court seeking a reversal of the decision of the Circuit Court of Appeals on both grounds and filed brief in support thereof. This petition was denied on October 13, 1941 (314 U. S. 629). Pursuant to this denial the Court of Appeals for the Seventh Circuit, on October 28, 1941,

issued a mandate to the District Court ordering the dismissal of the complaint. On December 8, 1941 the costs were taxed against the defendant in the sum of \$655.35 and execution was issued therefor and returned unsatisfied, and these costs remain unpaid at this date. A final decree dismissing the bill with costs was entered in the District Court on July 15, 1942.

Petitioner then employed a new attorney, Joseph T. Harrington, who on December 3, 1942 entered an appearance in this cause (Supp. Rec. 11).<sup>\*</sup> Thereafter the following occurred:

(5) Petitioner filed a petition with the Circuit Court of Appeals for permission to make application to the District Court for leave to file a bill of review and a brief in support thereof, on December 3, 1942 (Supp. Rec. 1). Respondent filed written answer to this petition on December 31, 1942 (Supp. Rec. 25) and on February 2, 1943 the Circuit Court of Appeals denied petitioner's petition (Supp. Rec. 43).

(6) Petitioner then filed with the Circuit Court of Appeals a motion to vacate the order of February 2, 1943 (Supp. Rec. 44) and this was denied on February 15, 1943 (Supp. Rec. 45).

Petitioner then employed new attorneys, Howard D. Moses and Charles G. Culver, who entered an appearance of record on August 4, 1943 (Supp. Rec. 45), and who are the attorneys presenting this petition. Thereafter the following occurred:

(7) Petitioner filed an amended petition for permission to make application to the District Court for leave to file a bill in the nature of a bill of review and a brief in support thereof on August 4, 1943 (Supp. Rec. 46).

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<sup>\*</sup> Supp. Rec. refers to the transcript of record filed in this Court by petitioner on March 1, 1944.



(8) Respondent filed a motion and a supplemental motion for an order to strike Petitioner's Amended Petition (Supp. Rec. 101-103) and on December 1, 1943 the Circuit Court of Appeals denied Petitioner's Amended Petition (Supp. Rec. 105).

(9) Petitioner has now filed in this Court, on March 1, 1944, nineteen and one-half months after the final decree dismissing this complaint was filed in the District Court, a second petition for a writ of certiorari and brief in support thereof.

### **Jurisdiction.**

The petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

This Court has previously refused to grant a writ of certiorari in this cause under date of October 13, 1941, at which time the petition for the writ of certiorari sought to bring to this Court the entire record, including the final decision of the Circuit Court of Appeals. Since this Court denied petitioner's original petition the Circuit Court of Appeals has issued its mandate ordering the District Court to dismiss the complaint, and the District Court on July 15, 1942 entered a final decree dismissing that complaint. Although the petitioner has made no attempt to review the final decree so entered, it has filed several pleadings with the Circuit Court which are comparable to a petition for rehearing, all of which have been denied. The denial by the Circuit Court of the last of these petitions is the basis upon which petitioner seeks a writ of certiorari from this Court.

Respondent suggests that this Court will not consider the granting of a writ of certiorari from the order of the Circuit Court denying petitioner's application for a rehearing because that is a matter addressed to the Circuit Court's

discretion. See *Conboy v. First National Bank of Jersey City* (203 U. S. 141; 51 L. Ed. 129). If respondent is correct in this contention then this present petition for writ of certiorari should not be entertained by this Court since it is not taken within three months from the date of any decree which is subject to review herein as required by Title 28, Section 350 of the United States Code, since the original decision of the Circuit Court of Appeals is dated March 6, 1941 and the order denying rehearing is dated April 14, 1941 and the final decree of the District Court dismissing the complaint was entered July 15, 1942, pursuant to the mandate of the Circuit Court of Appeals.

Even if this Court should consider this petition to be proper and timely, the specifications of errors and stated reasons for granting the writ are wholly inadequate under established precedents.

### **Argument.**

The decision of the Circuit Court of Appeals was based upon two separate and independent grounds. The respondent, who was charged with infringing petitioners patents by having sold the alleged infringing machine, denied that the machine he sold infringed petitioner's patents. The Circuit Court held that by reason of the differences between the machine sold by respondent and the claims under petitioner's patents, that no infringement resulted.

The respondent also pled an affirmative defense that the manufacturer, the Addressograph-Multigraph Corporation, had the right to manufacture these machines under the provisions of a license agreement from the petitioner. The Circuit Court held that the manufacture of the machine was permitted under this license agreement.

Neither petitioner's Specifications of Errors (Peti-

tioner's Pet. 7) or its Reason Relied On for Allowance of the Writ (Petitioner's Pet. 6), challenge the Circuit Court's opinion that because of the difference in structures, the machine which respondent sold did not infringe the petitioner's patents. Under these circumstances this point is not before this court for consideration, and therefore since the decision on this point defeats the petitioner's action, the writ should be denied. In the body of petitioner's argument, however, there is a brief reference to why the Circuit Court would or should find that this sale was an infringement, so we will discuss this point briefly.

#### POINT I.

#### **There Is No Basis for Petitioner's Claim That Upon Retrial the Circuit Court Would Change Its Opinion and Find Infringement.**

The petitioner admits that the machine sold by the respondent and the machine described in its patents differ in construction. The petitioner claims that if the Circuit Court had known that petitioner made these changes in the construction of the machine after the patents issued, then respondent would have been estopped from asserting this defense. The petitioner claims that the Circuit Court was prevented from knowing of this fact by the fraudulent conduct of its first attorneys in deleting from the record by stipulation blue prints which would have proven this fact (See Petitioner's Petition 3 and 19).

No such stipulation was made, nor were the blue prints deleted from the record as presented to the Circuit Court, and petitioner fails to point out where in the record any such stipulation or order of deletion is evidenced. The blue prints were included in the Designation of Record on appeal as physical exhibits (Orig. Rec. 223). They were

transmitted by the Clerk of the District Court to the Clerk of the Circuit Court (Orig. Rec. 440). They were considered by the Circuit Court as evidenced by the note in the court's opinion which said, "This opinion is written for the parties and their attorneys. Others seeking a complete copy of the two patents, the patents of the prior art, the drawings and the testimony, may find them in the office of the Clerk" (Orig. Rec. 448). The record does not sustain the petitioner's charge of fraud of his own counsel.

This entire matter was called to the attention of the Circuit Court and its action in refusing to reopen the case was clearly proper. No plea of estoppel was ever made in the original pleadings, nor could there be any legal or factual basis to support it. The agreements and transactions between the petitioner and the manufacturer could not raise an estoppel against this respondent who was not a party thereto, nor could petitioner extend his patent monopoly beyond the claims of his patents by any alleged estoppel. The Circuit Court held that because of difference in structures the machine which respondent sold did not infringe petitioner's patent and petitioner is not here contesting this ground of the decision. Petitioner cannot make this sale by respondent an infringement of petitioner's patent monopoly on any theory of estoppel.

## POINT II.

**Petitioner Is Not Entitled to a Writ of Certiorari to Review the Refusal of the Circuit Court of Appeals to Reopen the Case for a Determination of the Correctness of Its Decision Relative to the License Agreement.**

We feel that this question is academic in view of the obvious correctness of the court's decision that due to the differences in structures respondent's sale did not infringe petitioner's patent. This holding of non-infringe-

ment alone disposes of this case and fully supports the final decree dismissing the complaint entered July 15, 1942. However, as petitioner has devoted its entire showing to the construction of the license agreement, we will briefly discuss this point.

Petitioner's sole contention is that its first counsel refused to offer certain written testimony tending to establish the true intent of the license agreement and that such action on its counsel's part constitutes a fraud for which petitioner is entitled to try the case again on a different theory than originally presented. In the case of *United States v. Throckmorton* (98 U. S. 61, 66; 25 L. Ed. 93, 95), the court in discussing what action of counsel justified the reopening of a case said:

"where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,— *these, and similar cases which show that there has never been a real contest in the trial or hearing of the case*, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing." (Italics ours.)

The record contains no evidence of conduct of petitioner's counsel as above described, but the record does show that through the efforts of petitioner's first counsel, there was a "real contest in the trial" and in the Circuit Court of Appeals and before this court. Whether petitioner's first counsel knew of the written testimony at the time of the trial is a matter supported solely by petitioner's allegations attached as exhibits to its application to the Circuit Court of Appeals. We think that this court's attention should be directed to a letter written to the Circuit Court of Appeals by petitioner's first counsel, which reads as follows:

“THIESS, OLSON & MECKLENBURGER  
Attorneys and Counsellors  
77 West Washington Street  
Chicago

August 13, 1943

*The Honorable Evan A. Evans,*  
*The Honorable J. Earl Major,*  
*The Honorable Otto Kerner,*  
*Judges of the Circuit Court of Appeals,*  
*1212 Lake Shore Drive,*  
*Chicago, Illinois.*

GENTLEMEN :

There has recently come to our attention a document entitled ‘Amended Petition of Plaintiff-Appellee for Permission to Make Application to the District Court for leave to File a Bill in the Nature of a Bill of Review and Suggestions in Support Thereof’, filed in the case of *Jogger Manufacturing Corporation v. Wendell H. Roquemore, Doing Business as Multigraph Sales Agency*, Appeal No. 7274.

This document contains assertions reflecting upon the professional and personal integrity and conduct of Thorley von Holst, a member of our firm who has been associated with us in the practice of law for the last twenty years.

Should the Court contemplate taking any affirmative action on the assumption of the truth of these scurrilous statements, we respectfully ask that we, and Mr. von Holst, be given an opportunity, upon notice from this Court, to be heard on a motion presented to the Court, to strike all such averments as scandalous and impertinent, and as being utterly without foundation in fact.

Yours very truly,

THIESS, OLSON & MECKLENBURGER”

AFM:MS

It is difficult to see wherein petitioner could have been prejudiced in any way. In the District Court petitioner was successful without the evidence claimed to have been suppressed. In the Circuit Court of Appeals the evidence was submitted to the court in connection with the Amended Petition for Permission to Make Application To The District Court for Leave to File a Bill of Review. The Circuit Court after consideration of the evidence was still of the opinion that its decision was correct and denied petitioner's Amended Petition. The only objection left to petitioner is that the Circuit Court was in error in reaching this decision. A reading of this written testimony evidences at once that the manufacturer was demanding the very rights which the Circuit Court said were granted to it by the license agreement and that the petitioner was at first unwilling to grant these rights. This testimony we believe supports fully the Circuit Court's decision on this point.

The petitioner has recently filed in this court the affidavits of E. F. Koenig and W. C. Dunlap, and now moves that they be considered in conjunction with the record. These affidavits deal with the impressions, understandings and legal conclusions of the affiants as to matters that occurred thirteen years ago and do not purport to recite the facts by relating the conversations on which their conclusions are based. A comparison of the affidavits of these ex-employees of the manufacturer, with the letters produced by petitioner (Supp. Rec. 82-94) show that these affiants, like anyone else after thirteen years, have forgotten just what the negotiations actually encompassed. The final written license agreement on its face, clearly discloses that the manufacturer was granted broader rights than these affiants now recall as it specifically provides that the manufacturer may make these machines for attachment to its "products as from time to time manufactured" (Orig. Rec. 191).

### Conclusion.

The petition presents no ground for the exercise of this Court's jurisdiction since this Court should not grant a writ of certiorari to review the action of the Circuit Court of Appeals in denying what is in effect a petition for rehearing.

The decision in the case is rested on the ground that there was no infringement of petitioner's patent because the machine sold by respondent differed from the machine described in the patents. This point was brought to this court by a prior petition for writ of certiorari which was denied. Pursuant to this denial a final decree was entered in the District Court more than nineteen and one-half months before the present petition was filed. Petitioner's claims at this time do not question the finding of non-infringement because of difference in structures. For this reason alone the writ should be denied.

The petitioner's challenge to the Circuit Court of Appeals' findings relative to the scope of the license agreement fails to state any recognized grounds for the exercise of the jurisdiction of this court. Petitioner's complaints have all been fully and carefully considered by the Circuit Court of Appeals on four occasions and have been rejected each time. Perseverance may be a commendable characteristic, but in the interests of the public there must come a time in all cases when the court will tell a litigant that he is through, even though he wants to try again. The petition should be denied.

Respectfully submitted,

PHILIP M. AITKEN,

402 Woodmen Accident Bldg.

Lincoln, Nebraska,

*Counsel for Respondent.*